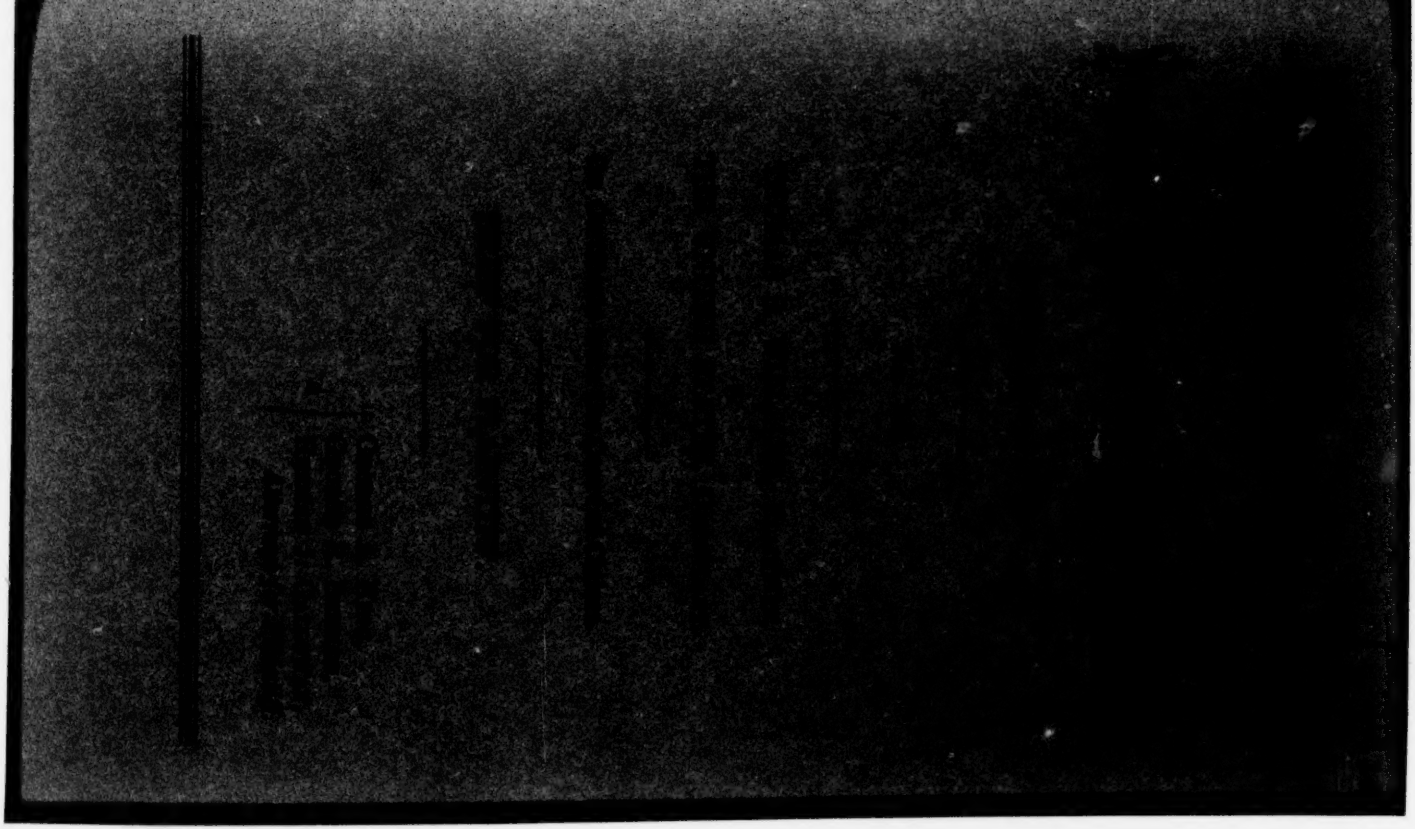

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# Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 728.

THOMAS S. WILLIAMS, *Plaintiff*,

*v.*

THE UNITED STATES, *Defendant*.

## BRIEF FOR PLAINTIFF.

### *Jurisdiction.*

This case comes before the court by certificate of the Court of Claims under Section 3 (a) of the act of February 13, 1925, Ch. 229, 43 Stat. 936, 939, as follows:

"That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause."

### *Statement of the Case.*

The suit is by Thomas S. Williams, a judge of the Court of Claims, to recover a balance of salary at the rate of $12,500 a year as fixed by act of December 13, 1926, Ch. 6, Section 1, 44 Stat. 919, "An Act to fix the salaries of certain judges of the United States," providing as follows: "To the Chief Justice of the Court of Claims and to each of the other judges thereof the sum of $12,500 per year." (Certificate, R. top p. 2.)

He has been paid at the rate of only $10,000 per year from July 1, 1932, to January 31, 1933, end of the month before the beginning of this suit, owing to a ruling of the Comptroller General of the United States that the salary of a judge of the Court of Claims is reduced to that amount by the provisions of Part II of the act of June 30, 1932, "Making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933," etc., ch. 314, 47 Stat. 382, 399–403. It is in part provided by that act under the heading "Special Salary Reductions," Section 107, sub-paragraph (a) (5), 47 Stat. 402:

"the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

The difference claimed for these seven months between the rates of $10,000 and $12,500 a year for that period is $1,458.33. (Certificate, R. 2; petition, R. 6, 7.)

*Suit and Certification.*

It is with reluctance that the plaintiff in this case brought suit in the Court of Claims. No other mode of testing the question was open. It is not a case of indirect reduction of pay by imposing a revenue tax like *Miles* v. *Graham*, 268 U. S. 501 (1925). It is a claim arising out of a direct attempt to reduce his judicial compensation. Jurisdiction of such a case is vested exclusively in the Court of Claims, and excluded from the concurrent jurisdiction of the District Courts by Section 24, Par. 20 of the Judicial Code, U. S. Code, Title 28, Sec. 41, which excludes from concurrent jurisdiction of the District Courts "cases brought to recover fees, salary or compensation for official services of officers of the United States," etc. The necessity and propriety of suing in such case in the only court having jurisdiction, even if the judges may be interested, is covered by the remarks in the opinion of this court in *Evans* v. *Gore*, 253 U. S. 245, 247, 248 (1920).

The petition was demurred to specially on the ground that the plaintiff is not one of those judges of an inferior court described in the Constitution whose compensation may not be diminished during his continuance in office. The Court of Claims has certified the question to this court.

*The Question Involved.*

The substantial question is the important one whether judges of the Court of Claims are "judges whose compensation may not, under the Constitution, be diminished during their continuance in office."

This question again depends on the question whether the Court of Claims derives its powers from Article III, Section 2 of the Constitution, extending the judicial power of the United States among other subjects "to controversies to which the United States shall be a party," or whether the court is a mere legislative creation to assist Congress in its constitutional duty under Article I, Section VIII "to pay the debts * * * of the United States."

The distinction between constitutional and legislative courts was taken in *American Insurance Company* v. *Canter*, 1 Peters, 511 (1828) where Chief Justice Marshall delivering the opinion of the court said (p. 546):

"We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that 'the judges, both of the supreme and inferior courts, shall hold their offices during good behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."

This decision is put partly on the ground of the temporary and provisional nature of the territorial courts and has little application to such a statute as "the great act of justice embodied in the jurisdiction of the Court of Claims" (*United States* v. *Emery*, 237 U. S. 28, 32 (1915), adopted as the permanent policy of the United States.

Other cases, such as *Clinton* v. *Englebrecht*, 13 Wallace, 434 (1872), and *McAllister* v. *United States*, 141 U. S. 174 (1891), hold judges appointed for a term of four years for the territories are not possessed of judicial power conferred by Article III, Section 2 of the Constitution, and hold their offices only by virtue of the power conferred upon Congress by the Constitution to make all needful rules and regulations respecting the territory belonging to the United States.

Finally, we have the case of *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929), in which this court refused to issue a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from the findings of the Tariff Commission on the ground that that court is legislative and that such appeal does not present a case or controversy within the meaning of Article III, Section 2 of the Constitution (279 U. S. 460, 461).

The subject of "Federal Legislative Courts" was shortly after the decision in the *Bakelite* case treated with great acuteness in an article in the Harvard Law Review for April, 1930, Vol. XLIII, No. 6, pages 894 to 924. Attention is invited to this article, much too long even for partial quotation in this brief.

In the course of deciding the *Bakelite* case the court also treated the status of the Court of Claims, though no question as to its jurisdiction or authority was there involved (279 U. S. 452–455).

Our contention is that the Court of Claims is a tribunal organized and existing under Article III, Section 2 of the Constitution of the United States extending the judicial power of the United States "to controversies to which the United States shall be a party."

## "Controversies to which the United States shall be a party" as Treated by Authorities Preceding the Establishment of the Court of Claims and Held to Extend to Controversies in which the United States is Defendant as well as those in which it is Plaintiff.

The most striking passage on the meaning of these words applying them to controversies to which the United States is defendant as well as to those to which it is plaintiff is contained in Story's great work on the Constitution, Vol. II, Sections 1674 to 1678.

In Section 1674 he treats of the necessity of giving to the national courts jurisdiction of cases in which the United States appears as plaintiff.

In Section 1675 he adds that the language used does not confer upon any court cognizance of all controversies to which the United States shall be a party, so as to justify a suit against the United States without its consent as expressed by Congress.

In Section 1676 he asks if the citizens of the United States are wholly destitute of remedy in such cases. He here gives a general statement that the people may remove public functionaries who abuse their trust and substitute in their stead others more faithful and more honest, and also that functionaries doing injustices are amenable for their injurious acts to the judicial tribunals at the suit of the oppressed.

This subject is continued in the first part of Section 1677.

We continue with the latter part of Section 1677 and the whole of Section 1678:

"The greatest difficulty arises in regard to the contracts of the national government; for, as they can not be sued without their own consent, and as their agents are not responsible upon any such contracts when lawfully made, the only redress which can be obtained must be by the instrumentality of Congress, either in providing (as they may) for suits in the common courts of justice to establish such claims by a general law, or by a special act for the relief of the particular party. In each case, however, the redress depends solely upon the legislative department, and can not be administered except through its favor. The remedy is by an appeal to the justice of the nation in that forum, and not in any court of justice, as matter of right."

"Sec. 1678. It has been sometimes thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the Constitution itself; but it lies, if at all, against Congress, for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the courts of the United States. In this respect there is a marked contrast between the actual right and practice of redress in the national government, as well as in most of the State governments, and the right and practice maintained under the British constitution. In England, if any person has, in point of property, a just demand upon the king, he may petition him in his court of chancery (by what is called a petition of right) where the chancellor will administer right, theoretically as a matter of grace, and not upon compulsion, but in fact as a matter of constitutional duty. No such judicial proceeding is recognized as existing in any State of this Union, as a matter of constitutional right, to enforce any claim or debt against a State. In the few cases in which it exists it is a matter of legislative enactment. Congress have never yet acted upon the subject so as to give judicial redress for any nonfulfilment of contracts by the national government. Cases of the most cruel hardship and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice which has been yielded only after the humble supplications of many years before the legislature. One can scarcely refrain from uniting in the suggestion of a learned commentator, that in this regard the constitutions, both of the national and State governments, stand in need of some reform to quicken the legislative action in the administration of justice; and that some mode ought to be provided by which a pecuniary right against a State, or against the United States, might be ascertained and established by the judicial sentence of some court; and when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation. Surely it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the crown, and that in a republic there is an utter denial of justice in such cases to any citizen through the instrumentality of any judicial process. He may complain, but he can not compel a hearing. The republic enjoys a despotic sovereignty to act or refuse as it may please, and is placed beyond the

reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice."

Here, suits against the national Government are treated as something which ought to be provided for by Congress as a matter of right. The proceeding which the great commentator suggests is likened by him to the petition of right in England. There a subject sues the King "theoretically as a matter of grace, and not upon compulsion, but in fact as matter of constitutional duty."

As we shall see later this court has recognized this very analogy between suits in the Court of Claims and proceedings by petition of right against the King in the courts of England.

Going still further back to the famous case of *Chisholm* v. *Georgia*, 2 Dallas, 419 (1793), the question there was whether the words of the Constitution, "controversies between a State and citizens of another State," included a case in which a State was defendant as well as plaintiff. The court decided, four judges against one, that a suit lay against the State.

Counsel for Chisholm, who was Attorney General Edmund Randolph, made these very pertinent arguments, pp. 426, 427, 428:

"The master-objection is, that the law has prescribed no execution against a State; that none can be formed with propriety; and that, therefore, a judgment against a State must be abortive. It is true, that no express execution is given by the judicial act or the process act. But has it ever been insinuated, that a dispute between two States is not within Federal cognizance, because no execution is marked out? Or, that for a like reason, the Court, given by the confederation, could not proceed?"

* * * * * * * * *

"But, after all, although no mode of execution should be invented, why shall not the Court proceed to judgment? It is well known, that the Courts of some States have been directed to render judgment, and there stop; and that the Chancery has often tied up the hands of the common law in a like manner. Perhaps, if a Government could be constituted without mingling at all the three orders of power, Courts should, in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their

opinions to be enforced by the Executive. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character."

Each justice gave a separate opinion. The following from the opinion of Chief Justice John Jay, holding that a State might be made defendant as well as plaintiff, touches on the correlative question as to whether the United States might be sued (p. 478):

"I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the Constitution which extends the judicial power to controversies 'between a State and the citizens of another State,' does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both Plaintiff and Defendant, it follows, that the United States may be sued by any citizen between whom and them there may be a controversy. This appears to me to be fair reasoning: but the same principles of candor which urge me to mention this objection also urge me to suggest an important difference between the two cases. It is this: in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the Executive power of the United States: but in cases of action against the United States, there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State and the case of the United States, in very different points of view.

"I wish the State of society was so far improved, and the Science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."

The remarks of Chief Justice Jay were concurred in by Justices Wilson, Cushing and Blair. Justice Iredell alone dissented. The majority opinion is full of remarks tending to show that when a controversy between parties is mentioned in the Constitution a perfect equality was intended, and

that therefore when the Constitution mentioned suits between two States and between a State and citizens of another State it made no difference which party was plaintiff and which defendant. As the Constitution gave the Supreme Court original jurisdiction in cases to which a State should be a party the proceedings were allowed in that court without any requirement of Congressional legislation in aid of the proceedings.

The words in the Constitution in regard to controversies to which the United States shall be a party are similar, but as Congress must first designate a tribunal in which the United States may be sued it follows that until Congress should designate and create a tribunal in which the United States might be sued there was a failure of legislation to carry out the intent of the Constitution. It is in this light that Justice Story treats the subject. The Eleventh Amendment was passed to take away the jurisdiction of suits brought by private citizens against a State, but it left unimpaired the right of one State to sue another and that right has been frequently exercised.

In *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904), Mr. Justice Brewer, delivering the opinion of this court, said (p. 318):

"We are not unmindful of the fact that in *Hans* v. *Louisiana*, 134 U. S. 1, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisolm* v. *Georgia*, but such expression can not be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State."

We have thus seen that long prior to the creation of any tribunal vested with jurisdiction of claims against the United States there was a declaration by Justice Story of not only the power but the duty of Congress to create a tribunal in which the United States might be sued, and that farther back than Justice Story's day the right of suit against a State was affirmed under the Constitution as it originally stood, and by

inference the power of Congress to authorize suit against the United States to be brought in some particular court to be designated by it under the constitutional grant of judicial power over "controversies to which the United States shall be a party."

**The Legislative History of the Court of Claims Shows from 1863 Onward that it has been Invested with Power to Render Judgments against the United States as a Tribunal Acting Strictly under the Constitutional Judicial Power.**

The first creation of the Court of Claims by that name was by act of February 24, 1855, Ch. 122, 10 Stat. 612, "An Act to establish a court for the investigation of claims against the United States." This act established a court consisting of three judges — a court in little more than name whose powers were confined to giving opinions on claims brought before it and submitting bills for the consideration of Congress. It was a tentative and hesitating measure and to a large extent failed of the purpose of its enactment.

President Lincoln in his message to Congress, December 3, 1861, recommended with reference to the Court of Claims, as follows:

"It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department. Besides, it is apparent that the attention of Congress will be more than usually engaged for some time to come with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final.

"Fully aware of the delicacy, not to say the danger, of the

subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court, reserving the right of appeal on questions of law to the Supreme Court, with such other provisions as experience may have shown to be necessary." (Messages and Papers of the Presidents, Vol. VI, p. 51.)

This recommendation, like that of Justice Story, made in his Commentaries in 1833, is based upon the duty on the part of the Government to render prompt justice against itself, just as it administers it between private individuals, and advocates placing the adjudication of claims under the Judicial Department where it belongs.

This recommendation was adopted by Congress in one or rather two different acts passed at the close of the 36th Congress.

1. The act of March 3, 1863, Ch. 92, 12 Stat. 765, "An act to amend 'An Act to establish a court for the investigation of claims against the United States, approved February 24, 1855.' " This act, containing fourteen sections, enlarged the personnel of the Court from three to five judges, and granted power to render judgments, as the rights of the parties might appear, such judgments to be final, with the right of appeal to the Supreme Court granted to either party where the amount involved exceeded $3,000. The Government was to be represented in all cases by a solicitor appointed by the President. A six-year statute of limitation was provided. The appointment of clerks and a bailiff was authorized. Rules of practice were to be formulated by the court. Its judgments when paid were conclusive of litigated rights and barred any future claim of like character upon the plaintiff's part. The act required the certification of judgments to the Secretary of the Treasury and the 14th section thereof provided (p. 768):

"That no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."

2. Contemporaneously with this act was passed one, approved March 12, 1863, Ch. 120, 12 Stat. 820, "An Act to

provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States." This act required special agents to be appointed by the Secretary of the Treasury to collect all abandoned or captured property in insurrectionary districts and made the following provision in section 3 with reference to the mode of proceeding by the owners of such property to obtain the proceeds thereof (p. 820):

"Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

*History of the Gordon Case.*

The case of *Gordon* v. *United States*, 117 U. S. 697 (1863), is referred to in the opinion of *ex parte Bakelite Corporation*, 279 U. S. 438, 454, as an authority for the proposition that the Court of Claims is a legislative court. The facts of that case when considered in their fullness place that case in a different light. The history of this case, and particularly of the opinion of Chief Justice Taney, 117 U. S. 697, was very fully stated by Chief Justice Waite, delivering the opinion of the court in *United States* v. *Jones* (1886), 119 U. S. 477, 478:

"The case of *Gordon* v. *United States*, 2 Wall. 561, holding that no appeal would lie from a judgment of the Court of Claims to this court, was announced March 10, 1865. The cause was originally submitted on the 18th of December, 1863, and on the 10th of April, 1864, it was ordered for argument on the second day of the next term. Chief Justice Taney died October 12, 1864, and the case was not reargued under the special order of the previous term until January 3, 1865. Consequently, the opinion published as an appendix to 117 U. S. 697, must have been prepared by him before the decision

was actually made. The records of the court show that in announcing the judgment Chief Justice Chase said: 'We think that the authority given to the head of an Executive Department by necessary implication in the 14th section of the amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, from the exercise of which alone appeals can be taken to this court. The reasons which necessitate this conclusion may be more fully announced hereafter. At present we restrict ourselves to this general statement, and to the direction that the cause be dismissed for want of jurisdiction.' This differs somewhat from the case as reported by Mr. Wallace, and shows precisely the ground of the opinion, to wit, the special provisions of Section 14. That section was as follows:

"'Sec. 14. That no money shall be paid out of the Treasury for any claim passed on by the Court of Claims till after an appropriation therefor shall have been estimated for by the Secretary of the Treasury.'

"At the next session of Congress after this decision the objectionable section was repealed by the act of March 17, 1866, c. 19, 14 Stat. 9," etc.

The act of 1866, here referred to, allowed appeals to be taken not only from future judgments of the Court of Claims but from those of the past which this court had found itself unable to consider under the supposed power of revision vested in the Secretary of the Treasury.

The case was thereupon again carried to this court by appeal, and heard and decided on its merits, *Gordon* v. *United States*, 7 Wallace, 188 (1869).

It is apparent therefore that the first action of this court refusing to take jurisdiction was based solely on the ground stated in the opinion of Chief Justice Chase—that the act of 1863 permitted a revision of the judgment by the Secretary of the Treasury, and that with that provision removed by the act of 1866 nothing further was supposed to stand in the way of this court taking jurisdiction on appeal.

This court in *United States* v. *Jones*, after the passage already quoted, proceeds, 119 U. S. 478, 479:

"From that time until the presentation of this motion, it has never been doubted that appeals would lie. Indeed, im-

mediately after the repealing act went into effect, and before the adjournment of the term then being held, a set of rules regulating such appeals was promulgated by this court, and it is safe to say that there has never been a term since in which many cases of the kind have not been heard and decided without objection from any one. At December Term, 1866, in *De Groot* v. *United States*, 5 Wall. 419, 427, the new rules were referred to and explained; and at the next term, in December, 1867, in *United States* v. *Alire*, 6 Wall. 573, 576, a case which could not be entertained on a general appeal, was sent back in order that a special appeal might be allowed of which this court could take jurisdiction. In delivering the opinion, Mr. Justice Nelson, who was with the majority when *Gordon's* case was decided, after referring to that case as denying the jurisdiction of this court 'on account of the power of the Executive Department over its judgment by the 14th section of the act of 1863,' said 'that section was repealed by the first section of the act of March 17, 1866.' So, too, in *United States* v. *O'Grady*, 22 Wall. 641, Mr. Justice Clifford, who also concurred in the judgment in *Gordon's* case, said, for the court: 'The Supreme Court declined to take jurisdiction of such appeals chiefly for the reason that the act practically subjected the judgments of the Supreme Court rendered in such cases to the re-examination and revision of the Secretary of the Treasury'; but, he added: 'subsequently Congress repealed the provision conferring that authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the Supreme Court should exercise jurisdiction of appeals in such cases.' This case was decided at October Term, 1874, and afterwards, at October Term, 1879, in *Langford* v. *United States*, 101 U. S. 341, 344, 345, Mr. Justice Miller, who dissented from the judgment in *Gordon's* case, after referring to that case and the grounds of its decision, said. 'An Act of Congress removing this objectionable feature having passed the year after that decision, this appellate power of this court has been exercised ever since.' It is manifest, therefore, not only that the jurisdiction was originally denied solely on the ground of the objectionable 14th section, but that, with this section repealed, nothing has ever been supposed until now to stand in the way of our taking cognizance of such cases."

Here is an authoritative statement that jurisdiction over such appeals was originally declined solely on the ground of the revisory power vested in the Secretary of the Treasury and that with that provision out of the way nothing was ever supposed to stand in the way of such appeals.

The position taken by Chief Justice Taney in the *Gordon* case, 117 U. S. 699, that the decisions of that court are not proper judgments, was never adopted as the decision of this court. Still less is it true as stated in that opinion (117 U. S. 702):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

This view is inconsistent with the later action of this court in considering and deciding the *Gordon* case on its merits, as well as with the views expressed by this court in its opinion in *United States* v. *Jones*, just fully quoted.

*Constitutional Status of the Court of Claims Early Recognized.*

With this legislation before it (Acts of March 3 and March 12, 1863) the Supreme Court not merely in one but in several cases passed on the character of the new tribunal thus created and on the character of judgments which it was authorized and directed to render. Particularly significant is the case of *United States* v. *Klein*, 13 Wallace, 128 (1872).

That case arose under the Abandoned and Captured Property Act of March 12, 1863. The person claiming the proceeds of the property in the Court of Claims, pleaded as a basis of loyalty that he had received a pardon from the President for the acts claimed to constitute disloyalty. Congress passed an act according to which a pardon instead of blotting out the offense and giving the petitioner the right to claim as a loyal citizen was to be taken as evidence of disloyalty. Chief Justice Chase, giving the opinion of the court, repudiated the idea that Congress might thus deprive a pardon of its constitutional effect by prescribing a rule of decision either to the Court of Claims or to the Suprme Court. He said (13 Wallace, 144-146):

"It was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfill its obligations. Before the

establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 (10 Stat. 612) for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

"In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. (12 ib. 765.) This court being of opinion (2 Wall. 561) that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision (14 Stat. 9). Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal (14 Stat. 44, 391, 444).

"The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.

"Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.

"But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on

such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion, or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in cases pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease, and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?"

The conclusion is thus stated (p. 147):

"It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

"Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

This was a clear decision that Congress can not prescribe a rule of decision for the Court of Claims in the original consideration of a case any more than it can for the Supreme Court on appeal.

It is a clear recognition of the Court of Claims as one of those courts under Article III, Section II of the Constitution, exercising part of the regular judicial power of the United States.

The *Klein* case shortly after its announcement by this court was so construed by the Court of Claims in *Witkowski* v. *United States*, 7 C. Cls. 393 (1872).

The court there said (p. 397):

"The decision turns not on the point of the Supreme Court's distinctive consititutional powers, but is placed on the broader ground that the act infringes upon the proper powers and duties of the judicial and executive departments of the Government. '*It is*,' says the opinion, '*the intention of the Constitution that each of the three great co-ordinate departments of the Government, the legislative, the executive, and the judicial, shall be, in its sphere, independent of the others.*' And this act of Congress is held to be unconstitutional because by it the legislative department essayed on the one hand to impair the constitutional acts of the executive, and on the other to control the constitutional proceedings of the judiciary.

"If any doubt remain as to the meaning of the extent of the Supreme Court's decision, it would be dissipated by the fact that '*it was urged in argument*' in the court above, '*that the right to sue the Government in the Court of Claims is a matter of favor*,' and hence that Congress can prescribe the rule of decision in every case. To which the opinion of the Supreme Court replies that '*this seems not entirely accurate;*' '*that it is as much the duty of the Government as of individuals to fulfil its engagements*,' and that the Court of Claims is one of '*those inferior courts which Congress authorizes*,' but which exercises '*all the functions of a court*.' It is the unquestionable intent of the decision that the statute is unconstitutional because it inter-

feres with the proper administration of justice in the judicial department of the Government, of which the Court of Claims is an element; and that while Congress may withdraw cases from its jurisdiction, or prescribe the terms and conditions upon which actions may be brought, yet Congress can not prescribe to it a rule of decision, nor interfere with the proper exercise of its judicial functions." (Italics in original.)

**Other Legislation Relating to the Court of Claims During the Period of Twenty Years Elapsing after 1863.**

Act of May 9, 1866, Ch. 75, 14 Stat. 44, extended the jurisdiction of the Court of Claims to claims of any paymaster or quartermaster, etc., or other disbursing officer of the United States for relief from responsibility for Government funds, etc.

Act of June 25, 1868, Ch. 71, 15 Stat. 75, extended the right of appeal on the part of the United States to all cases (Section 1). It provided by section 7, p. 76, that the head of any executive department may transmit cases to the Court of Claims for rendering final judgments. It made other miscellaneous provisions with respect to the court.

The act of July 27, 1868, Ch. 276, 15 Stat. 243, made further provisions in regard to suits in the Court of Claims. Section 2 conceded to "aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts" "the privilege of prosecuting claims against the United States in the Court of Claims, as now provided by law."

This provision, as will be seen hereafter, received from this court an important construction bearing upon the question involved in this case.

The act of June 16, 1880, Ch. 243, 21 Stat. 284, conferred jurisdiction upon the Court of Claims for the settlement of all outstanding claims against the District of Columbia.

From March 3, 1863, to March 3, 1883, a period of twenty years, no jurisdiction was conferred upon the Court of Claims authorizing it to render anything but final judgments.

## Legislation Conferring Advisory Jurisdiction on the Court of Claims.

If the Court of Claims from its reorganization in 1863, when it was made a true constitutional court, until March 3, 1883, had no jurisdiction other than to render final judgments in controversies to which the United States is a party, it did not lose that character by later having certain advisory jurisdiction conferred upon it.

The acts conferring advisory jurisdiction are as follows:

Act of March 3, 1883, commonly known as the Bowman Act, Ch. 116, 22 Stat. 485, "An Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government."

This act conferred upon the Court of Claims jurisdiction of any claim referred to it by either House of Congress or by any Committee thereof to find the facts and report the same to the committee or to the House by which it was transmitted for consideration, also jurisdiction over claims or matters pending in any of the executive departments involving controverted questions of fact or law. Under both kinds of references the court was not to enter judgment but was to transmit its findings of fact or findings of fact and conclusion of law, as the case might be, to the House or Committee of Congress, or to the head of the executive department by which the case had been transmitted for consideration.

Act of January 20, 1885, Ch. 25, 23 Stat. 283, "An Act to provide for the ascertainment of claims of American citizens for spoliations committed by the French prior to the 31st day of July, 1801." This act required the court to examine the French Spoliations Claims and report to Congress, the findings and report to be merely advisory.

### The Tucker Act of March 3, 1887.

This act entitled "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, Ch. 359, 24 Stat. 505, constitutes a fairly complete reenactment and wide extension of the jurisdictional acts of the Court of Claims. Its main provisions contemplate final

and conclusive judgments, though it also contains other provisions for decisions of a merely advisory character. As this act forms the foundation of the present jurisdiction of the Court of Claims it is printed in full as an Appendix to this brief. Its provisions are preserved in the Judicial Code, Ch. 7, Sections 136 to 187, and in the United States Code, Title 28, Sections 241 to 293.

The Tucker Act provides "that the Court of Claims shall have jurisdiction to hear and determine" the following matters:

First: "All claims founded (1) upon the Constitution of the United States";

(2) Upon "any law of Congress";

(3) "Upon any contract, express or implied, with the Government of the United States, or for damages," "in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

Second: All set-offs, counterclaims, claims for damages or other demands, which the Government may have against any claimant in said Court.

The act also provides for and continues the right of reference by either House of Congress of bills for the payment of money for an ascertainment of the facts and report of them; and for references by heads of departments for what were known as advisory opinions.

An important feature of the Tucker Act, that must be considered when the status of the Court of Claims is involved, is

"Sec. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed $1,000, and the circuit courts of the United States shall have such concurrent jurisdiction, in all cases where the amount of such claim exceeds $1,000 and does not exceed $10,000. All cases brought and tried under the provisions of this Act shall be tried by the Court, without a jury."

From these references it appears that there has been a continuous growth in classes of cases of which the Court of Claims

has cognizance. It was the first court established to hear and determine and render final judgments in cases against the United States. For more than 65 years it has been deciding such cases and has disposed of more than 50,000 of them. The appeals to the Supreme Court from its judgments exceed 1,000 in number.

An explanation of the rule that the sovereign can not be sued, except with his consent, is thus stated by the Supreme Court, *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 353:

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

A reference to some of the cases, under the several classes of claims, may serve to illustrate the court's status:

I. *Claims founded upon the Constitution.*

Before the jurisdiction was conferred by the Tucker Act, the method adopted to make the Government respond for the value of private property, taken for public use, was to authorize suit as upon an implied contract. See *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645 (1884).

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), Congress, in directing the expropriation of the company's property, prescribed that certain elements should not be considered, in determining values. This court said (p. 327):

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

It is true that the *Monongahela Navigation* case was not a case coming from the Court of Claims but was a condemnation proceeding instituted by the Government in the Circuit Court for the Western District of Pennsylvania. The principle announced in the *Monongahela Navigation Company* case has, however, been fully applied by this court in a number of cases coming from the Court of Claims under statutes passed during the World War. In these cases the right to compensation is recognized as founded upon the Constitution.

*Seaboard Air Line Railway Co.* v. *United States*, 261 U. S. 299 (1923), was a suit against the United States in the District Court under the Lever Act for land taken for storage facilities for supplies. The only question was whether the owner was entitled to interest. The court, after a comprehensive discussion of this question in cases coming both from the Court of Claims and from other courts, said (p. 306):

"The Constitution safeguards the right and Sec. 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands, at the time of taking.' *United States* v. *Sargent* (C. C. A., Eighth Circuit) 162 Fed. 81, 84.

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

In *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106 (1924), arising out of the requisition of a contract for the construction of a ship under the power of requisition conferred upon the President by the emergency shipping act of June 5, 1917, ch. 29, 40 Stat. 182, it was held that the claimant's contract and its rights and interests thereunder were expropriated. The decision was placed on the ground that the statute authorizing requisition was passed to carry out the Fifth Amendment.

The court, in the opinion by Mr. Justice Butler, said (p. 123):

"It is the property and not the cost of it that is protected by the Fifth Amendment. *Minnesota Rate Cases*, 230 U. S. 352, 454."

"It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States*, 262 U. S. 337, 340; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States*, supra; *United States* v. *Benedict*, 261 U. S. 294, 298; *Brown* v. *United States*, 263 U. S. 78."

In *Liggett & Myers* v. *United States*, 274 U. S. 215 (1927), this court said (pp. 218, 220):

"The plaintiff contends that the products were taken under the power of eminent domain and that it is entitled to such additional sum as will produce the equivalent of their value paid at the time of the taking; and that interest at a reasonable rate is the measure of the amount required to be added in order to make just compensation.

"The sole question is whether the facts found constitute a taking by eminent domain."

"The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123."

In *Phelps* v. *United States*, 274 U. S. 341 (1927), the sole question was as to the allowance of interest. This was allowed, on strictly constitutional grounds. The court said (pp. 343, 344):

"This action was brought under Sec. 145 of the Judicial Code. That section gives to the Court of Claims jurisdiction to hear and determine 'all claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States * * *.' Section 177 provides that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for its payment. Under the Fifth Amendment plaintiffs were entitled to just compensation; and within the meaning of Sec. 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the Government as well as with common justice, the owner's claim is one arising out of implied contract."

"Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States*, *supra*, 304; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett and Myers Tobacco Co.* v. *United States*, 274 U. S. 215."

In this line of cases, so strictly was the rule of just compensation enforced, that the Supreme Court has held that the party was entitled to receive, at the time of payment, the equivalent of the just compensation at the time of the taking,

and to that end, that allowance should be made for the delay in payment. This it was held could be done in the shape of interest. Under this view, and notwithstanding the provision in the act of 1863—and still the law—that the Court of Claims should not allow interest on any claim to time of judgment (unless on contract expressly stipulating for interest) the Supreme Court, reversing the judgment of the Court of Claims, held that interest should be allowed. *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106 (1924); *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215 (1927).

*Concurrent Jurisdiction of the District Courts.*

Of course, the District Courts as "constitutional courts" were in cases of taking private property exercising the judicial power of the United States vested in them in accordance with Article III of the Constitution, and could not have heard cases against the United States except under and in conformity with permissive legislation by Congress.

While the jurisdiction of the Court of Claims was broadened by the Tucker Act and no restrictions placed upon its exercise by limit of the amount of the claim in question, either way, whether by minimum or by maximum, a significant grant of concurrent jurisdiction was made to the circuit and district courts (now district courts alone) of all claims not exceeding $10,000 in amount.

In the first case coming up to this court after the enactment of the Tucker Act, *United States* v. *Jones*, 131 U. S. 1 (1889), this court held that as to subject-matter the use of the phrase "concurrent jurisdiction" meant the same jurisdiction within limits as to amounts and that this included only a money judgment not extending to a decree for the possession of land.

This court said (p. 19):

"We can not yield to the suggestion that any broader jurisdiction as to subject-matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction—'concurrent jurisdiction' only—within certain limits as to amounts; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached."

Concurrent jurisdicition of the District Courts (then also Circuit Courts) was further restricted as to subject-matter by the act of June 27, 1898, ch. 503, Sec. 2, 30 Stat. 494, 495, as follows:

"That section 2 of the Act aforesaid, approved March 3, 1887, be, and the same is hereby, amended by adding thereto at the end thereof the following: 'The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.' "

This provision is preserved in Section 24, Par. 20 of the Judicial Code and in U. S. Code, Title 28, Sec. 41, Par. 20.

It would be anomalous to say that a court exercising jurisdiction not limited as to amount is not a constitutional court, while those having concurrent jurisdiction given to them up to a limited amount are courts of superior status.

The practical effect in operation of these two provisions is shown by the history of three different claims brought before the Supreme Court for damages caused by overflow of water.

In the cases of *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Williams*, 188 U. S. 485 (both in 1903), damages were claimed for overflow of land by obstructions placed in the Savannah River by the United States affecting plantations in the State of South Carolina.

These two suits were brought in the U. S. District Court for South Carolina, the damages in each case not exceeding $10,000 in amount.

Another plantation, situated between those of the plaintiffs suing in the South Carolina District Court, was also overflowed but the damages amounted to more than $10,000 and suit could only be brought in the Court of Claims. *Heyward* v. *United States*, 52 C. Cls. 87 (1917). The court said (p. 89):

"We are of opinion that the case falls squarely within the decision of the Supreme Court in *United States* v. *Lynah*, 188 U. S. 445. The lands involved adjoin the 'Verzenobre' plantation on one side and Beech Hill on the other. The

former were in issue in the *Lynah* case and the latter in the *Williams* case, 188 U. S. 485. The natural situation is identical in all important respects.

"Judgment will be awarded the claimant for 936 acres at $25 per acre, amounting to $23,400."

This case also came up to this court and the judgment in favor of the plaintiff was affirmed, though this time by an equal division of this court. *United States* v. *Heyward*, 250 U. S. 633 (1919.)

Here, we have three plantations side by side. In the two on either side the suits were brought in the U. S. Circuit, now District Court, though the plaintiffs had an option equally to proceed in the Court of Claims had they so desired.

On the plantation in the middle the damages were too great to come within the concurrent jurisdiction of the district court. Suit therefore could only be and was brought in the Court of Claims.

We have therefore the anomalous situation of three suits brought by owners of land situated side by side, two of them brought in the District Court for South Carolina under the option given to a plaintiff having damages not exceeding $10,000 to sue in a district court having concurrent jurisdiction with the Court of Claims, while the third suit was by reason of its amount too large to be brought in a district court and therefore had to be brought in the Court of Claims.

It follows from what has been stated that the Court of Claims was treated by the Tucker Act as of at least equal authority and jurisdiction with the district courts.

The Court of Claims in rendering judgment in one of these three cases exceeding $10,000 was trying a "controversy to which the United States was a party" and the district court proceeding concurrently but within a more restricted jurisdiction was equally deciding a "controversy to which the United States was a party."

In order to explain the concurrent jurisdiction of the District Courts and the Court of Claims over claims for less than $10,000, one must say that the adjudication of a single claim involves an exercise of the "judicial power" or not, according

as the claimant elects to sue in a District Court or in the Court of Claims.

It would seem to be a *reductio ad absurdum* to say that where suit is brought in the Court of Claims and may be for any amount without limit in either direction, the judgment is not in the constitutional sense an adjudication of a controversy arising under the Constitution and laws of the United States, "to which the United States is a party," while if brought in another court the limit of whose jurisdiction has been carefully fixed by Congress at not exceeding $10,000 the judgment is of higher standing and is that of a constitutional court. The mode of enforcing the judgment is the same in either case and is just as much a judgment in the sense of an action of a strictly judicial tribunal in one case as it is in the other.

2. *Of claims founded upon any law of Congress:*

The claims under this clause are so numerous that one or two illustrations will suffice. *Medbury* v. *United States*, 173 U. S. 492, 497 (1899), discusses it. The most numerous under this branch are those for a refund of taxes wrongfully or illegally exacted.

*United States* v. *Emery, Bird, Thayer Company*, 237 U. S. 28 (1915) was a suit from the district court under the Tucker Act. Mr. Justice Holmes, giving the opinion of the court, said (pp. 31, 32):

"The jurisdiction over suits against the United States under Sec. 24, Twentieth of the Judicial Code, extends to 'all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress.' However gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, Sec. 24, First) and those 'founded upon' (id. Sec. 24, Twentieth) a law of the United States, rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

Under this heading of Claims founded upon any Law of Congress come the many suits in that court for official salary or compensation of officers in every branch of the public service.

3. *Of contracts, express or implied, with the Government:*

This jurisdiction, as may be supposed, has been the source of much litigation. It was early decided that the rules of law applicable to contracts between individuals apply to authorized contracts with the Government,—that, as to these, the Government abandons its sovereignty and submits the claim to adjudication, as in other cases of contract. *United States* v. *State National Bank*, 96 U. S. 30 (1877), (10 C. Cls. 519).

Under this branch of its jurisdiction the Court has decided cases calling for the application of nearly every phase of the law of contracts. There have been before it contracts for battleships, for public buildings, for dry-docks, lighthouses, dredging, for mail transportation, with claims for damages for breach or for delays, contracts growing out of the Reclamation Service, implied contracts for use of patented inventions, for property delivered, for property taken, for services rendered, contracts involving questions of liquidated damages, contracts involving the judgment of a designated officer in settling questions and of good faith, questions of abandonment or annulment of the contract, or suspension, or rescission.

## Advisory Jurisdiction of the Court of Claims is Distinct from its General Jurisdiction to Render Judgments.

The branches of jurisdiction mentioned come within what is known as the court's "general jurisdiction." It has also a "special jurisdiction" involving references by either House of Congress of "bills for the payment of money" or transmittals by heads of executive departments of certain matters. The right of one House to refer bills has been greatly reduced by the "Crawford Amendment" to the Omnibus Claims Act of March 4, 1915, Ch. 140, Sec. 5, 38 Stat. 962, U. S. Code, Title 28, Sec. 251, taking out of the court's jurisdiction claims barred by any law of Congress, the six-year statute of limitations being one such. See *Chase* v. *United States*, 50 C. Cls.

293 (1915). Under the Crawford Amendment several thousand Congressional references were stricken from the court's dockets. In Congressional references the court's function is to find the facts and report them to the House referring the bill. It gives no judgment. In matters transmitted by the head of an executive department its function was originally to give an advisory opinion. The court has held that under the statutes appearing in the Judicial Code and since it may not be called upon for advisory opinions. *White Earth Roll*, 50 C. Cls. 19–28 (1914); *In re Proposed References*, 53 C. Cls. 370 (1918), 59 C. Cls. 813 (1924).

### Patent Jurisdiction of the Court of Claims.

The act of July 1, 1918, Ch. 114, 40 Stat. 704, 705, "An Act making appropriations for the Naval service for the fiscal year ending June 30, 1919," etc., authorized the Court of Claims in case of the use of a patented invention by or for the United States to award to the owner of the patent his reasonable and entire compensation for the use of the invention.

This statute received an important construction from this court in *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331 (1928). Here the court construing the statute as taking away the right of the owner of the patent to recover from the contractor of the United States for infringement and substituted for it a remedy against the Government. The court in an opinion by Chief Justice Taft said (pp. 345, 346):

"To accomplish this governmental purpose, Congress exercised the power to take away the right of the owner of the patent to recover from the contractor for infringements. This is not a case of a mere declared immunity of the Government from liability for its own torts. It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person which but for this Act he would have against the private wrongdoer. This result, if 3477 Rev. Stats. applies and avoids the assignment, would seem to raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment to the Federal Constitution. We must presume that Congress in the passage of the Act of 1918 intended to secure to the owner of the patent the exact equivalent of what it was taking away from him. It

was taking away his assignable claims against the contractor for the latter's infringement of his patent. The assignability of such claims was an important element in their value and a matter to be taken into account in providing for their just equivalent. If section 3477 applied, such equivalence was impossible.

"It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality. *Phelps* v. *United States*, 274 U. S. 341. Moreover, we should seek to carry out in our dealing with the Act of 1918 and Revised Statutes 3477 the very important Congressional purpose of the former, as already explained, in the promotion of the War, as a special legislative intent."

But for this act suits would have lain in the District Courts against contractors with the Government and this remedy it was held Congress could constitutionally take away but only on condition of substituting an equally effective remedy against the Government.

**Sections of the Tucker Act Involving Advisory Opinions in No Way Conflict with the Constitutional Nature of the Court and of Its Judgments under the First 11 Sections of the Act.**

Section 12 (24 Stat. 507) provides "that when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department" may transmit the case to the Court of Claims and "when the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted."

It was under this provision that the case *In re Sanborn*, mentioned in the opinion in the *Bakelite* case, came before the court. Under this purely advisory jurisdiction the Court of Claims decided the *Sanborn* case adversely to the petitioner; and this court held *In re Sanborn*, 148 U. S. 222 (1893) that there was nothing obligatory on the department in these findings of fact and conclusions and that (p. 227) "there was really *no suit* to which the United States were parties."

In the same opinion the court carefully pointed out what was

the difference between a case of that kind and cases in which the conclusion of the Court of Claims is "made by the statute the final and indisputable basis of action either by the department or by Congress" (middle p. 226). The whole implication is that in such cases a judgment of the Court of Claims constitutes a final and indisputable basis of action, and therefore comes within the constitutional grant of judicial power extending it to cases arising under the Constitution and laws of the United States and "to controversies to which the United States shall be a party."

*In re Sanborn*, 148 U. S. 222 (1893) mentioned in the *Bakelite* opinion as being one in which the Supreme Court "plainly was of opinion that the Court of Claims is a legislative court," arose upon a petition for a writ of mandamus, requiring the Court of Claims to grant an appeal. A matter had been transmitted by the Secretary of the Interior, with the plaintiff's consent, had been investigated and ordered to be returned with the court's conclusions to the Secretary. The matter itself involved a claim of an attorney for a stipulated fee out of an Indian fund. The conclusion being unfavorable to the plaintiff, he applied for an appeal, and this being refused upon the distinct ground (27 C. Cls. 485) that its report in such cases is not subject to appeal, the petition for mandamus followed. The Supreme Court denied the writ, holding that there could not be an appeal from mere advisory opinions. It lays emphasis on the kind of judgments necessary to sustain appeals. It may be remarked that the statement in *Sanborn's case* about claims transmitted by heads of departments with plaintiff's consent to the court, is perhaps too broad, because the *New York case*, 160 U. S. 598 (1896) arose upon the reference of a very old claim by the Secretary of the Treasury to the Court of Claims. Jurisdiction was taken by the latter and its judgment was affirmed. However, *Sanborn's case* arose under the court's "special jurisdiction."

The power of Congress to authorize constitutional tribunals to perform extra-judicial services was thus stated in the opinion given by Chief Justice Richardson in *Sanborn* v. *United States*, 27 C. Cls. 484 (1892) at page 490:

"I am also aware that the Supreme Court held, in an early decision, reported in a note to *Ferreira's case* (13 Howard, 52) that a technically judicial court can not constitutionally be authorized to perform extra-judicial services; but I can see no reason why the judges, acting collectively in the name of the court, may not voluntarily perform such services when designated to do so by act of Congress, as well as judges of the Supreme Court designated by their official position to sit in other extra-judicial tribunals. (Act January 29, 1877, ch. 37, sec. 2, 19 Stat. 228)."

**It is No Objection to the Jurisdiction of the Court of Claims as a Court Proceeding under the Constitution of the United States that it Can Not by Its Judgments Award an Execution to be Levied on the Property of the United States.**

There is asserted against the right of the judges of the Court of Claims to be regarded as judges of a constitutional court that that court has no power to issue an execution to enforce its judgments. The opinion of Chief Justice Taney in *Gordon* v. *United States*, 117 U. S. 697 (1863), is referred to as authority against the constitutional character of the Court of Claims. One sentence expresses his thought in regard thereto (p. 702):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."

The idea that it is necessary in order to make a judgment binding that an execution shall be awarded to carry it out has now been entirely exploded. This court in *Fidelity National Bank* v. *Swope*, 274 U. S. 123 (1927), said in the opinion by Mr. Justice Stone, pp. 132, 133:

"While ordinarily a case of judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, *Tutun* v. *United States*, 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, *Traphagen* v. *Levy*, 45 N. J. Eq. 448; bills of interpleader, so far as the stakeholder is con-

cerned, *Wakeman* v. *Kingsland*, 46 N. J. Eq. 113; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon* v. *Tucker*, 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgments into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. Cf. *Kennedy* v. *Babcock*, 19 Misc. (N. Y.) 87; *Cohen* v. *N. Y. Mutual Life Ins. Co.*, 50 N. Y. 610, 625. Nor is it essential that only established and generally recognized forms of remedy should be invoked. 'Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status.' *Tutun* v. *United States*, *supra*, 577. Thus, naturalization proceedings, *Tutun* v. *United States*, *supra*, or a special statutory proceeding to determine judicially whether the claim made by a domestic corporation against a foreign country upon which an award had been made by a United States commissioner, pursuant to treaty, had been furthered by fraud, the statute authorizing distribution of the fund in accordance with the judgment, *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, are cases or controversies within the meaning of the Constitution."

In *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899), the suit was brought *by* the United States in the Court of Claims *against* a claimant who had obtained an award against the Government of Mexico by the Mexican-American Mixed Claims Commission. A special statute allowed the United States to bring action to obtain a decision whether the award had been obtained as was alleged through fraud and perjury and if so forever to bar its further prosecution; while if obtained properly and rightfully it was to be paid.

Counsel for the mining company made the objection that "The Court of Claims has no jurisdiction over this matter, because it is not a 'case' within the meaning of the Constitution, nor is it a 'controversy' to which the United States is a party." This objection was overruled by this court after a discussion of the same cases that are referred to in the *Bakelite Corporation* case.

The court, in opinion by Mr. Justice Harlan, said (pp. 457, 458):

"Under the principles established in the cases above cited, the objections urged against the jurisdiction of the Court of Claims and of this court can not be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by the Court of Claims and by this court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties."

Further remarks show that the court placed its decision squarely upon the ground that such a controversy was within the "judicial power of the courts of the United States."

Continuing, pp. 461, 462:

"We entertain no doubt these rights are susceptible of judicial determination within the meaning of the adjudged cases relating to the judicial power of the courts of the United States as distinguished from the powers committed to the Executive branch of the Government.

"It remains, in our consideration of the question of jurisdiction, to inquire whether the judgment authorized by the act of 1892 to be rendered would be a final, conclusive determination, as between the United States and the defendants, of the rights claimed by them respectively, or only ancillary or advisory. In our opinion the act of Congress authorized a final judgment of the former character and therefore the judgment of the Court of Claims is reviewable by this court in the exercise of its appellate judicial power. If our judgment should be one of affirmance then the La Abra Company, and its legal representatives or assigns are barred of all claim, legal or equitable, to the money received by the United States from the Republic of Mexico on account of the award of the Commission. Such a determination would rest upon the broad ground that the United States in its efforts to protect the alleged rights of an American corporation had been the victim of fraud upon the part of that corporation, its agents or assigns, and was in law relieved from any responsibility to that corporation touching the claim in question or the moneys received on account of it. If, on the other hand, this court should find that the charges of fraud were not sustained or were disapproved, and reverse the decree of the Court of Claims, then it would become the absolute legal duty of the Secretary of State to proceed in the distribution of the moneys in his hands according to the terms of the award. It was competent for Congress by statute

to impose that duty upon him and he could not refuse to obey the mandate of the law."

The court proceeded at great length to consider the case on its merits, the conclusion being that the claim was without foundation. It placed the jurisdiction not only of this court but of the Court of Claims on the ground that the subject matter was a "case" or "controversy" within "the judicial power of the courts of the United States."

Of course in any judicial proceeding we should look for the mode of carrying the judgment into effect to be such as is appropriate to the subject-matter and the character of the parties.

For the Court of Claims to be authorized to issue an execution to a United States marshal to authorize him to levy on the moneys in the Treasury or on other property of the United States to satisfy its judgments is to suggest an absurd impossibility. It would also be in conflict with the mandate of the Constitution, Article I, Section 9, Clause 7, "No money shall be drawn from the Treasury but in consequence of appropriations made by law." We have seen that Justice Story, as far back as 1833, suggested "that some mode ought to be provided by which a pecuniary right against a State, or against the United States, might be ascertained and established by the judicial sentence of some court; and when so ascertained and established, the payment might be enforced from the national Treasury by an absolute appropriation."

Here the proper mode of enforcement of a judgment is treated as being the constitutional one of appropriating money from the Treasury for its satisfaction.

A judgment rendered by the Court of Claims and not reversed by this court is just as binding an obligation of the Government as a bond issued by the Government. The fact that no appropriation happens to be at hand to satisfy it means no more than when an execution is issued by some court and no assets can be found which can lawfully be appropriated to satisfy the judgment.

In many States exemptions of homesteads and other property are so liberal that a judgment-debtor can hold considerable

property free from seizure on execution by his creditors. Such laws have been held by this court to apply to executions issued in a suit of the United States as well as suits of private creditors. *Fink* v. *O'Neil*, 106 U. S. 272 (1883). As a general rule it may be stated that a judgment against the United States is more readily collectible than one against an individual.

The proper routine method of enforcing judgments is well shown by the terms in which they are transmitted to Congress. President Hoover in House Document #546, 72d Congress, 2d Session, dated February 10, 1933, transmitted a list of Court of Claims judgments with the following letter:

"I have the honor to transmit herewith for the consideration of Congress, in compliance with the provisions contained in the act of September 30, 1890 (U. S. C. title 31, sec. 226) and the deficiency act of April 27, 1904 (U. S. C. title 31, sec. 583, par. 2), a list of judgments rendered by the Court of Claims, which have been submitted by the Attorney General through the Secretary of the Treasury and require an appropriation for their payment as follows:

* * * * * * * * *

"The necessity for the appropriation asked is explained in the letter of the Director of the Bureau of the Budget transmitted herewith, in whose conclusions and observations thereon I concur."

The accompanying letter of the Director of the Bureau of the Budget referred to says in its closing paragraph:

"Since the foregoing are obligations of the Government lawfully imposed, and which (subject to the reserved right of appeal) must be paid, an appropriation for that purpose is necessary at this time."

This is the regular, ordinary, and proper routine for the payment of judgments against the United States and is all that is required.

*Judgments in Favor of the United States on Set-offs and Counterclaims.*

When it comes to judgments rendered by the Court of Claims on counter-claims, we find a very different proceeding.

By Sec. 1, Par. 2 of the Tucker Act of 1887, which has been in force since 1863 (act of March 3, 1863, ch. 92, sec. 3, 12 Stat. 765), and is still in force under Judicial Code, Secs. 145, Par. 2, and 146, and U. S. Code, Title 28, Secs. 250, 252, all set-offs, counterclaims, etc., on the part of the Government of the United States are brought within the jurisdiction of the Court of Claims.

The law governing that situation constitutes Section 146 of the Judicial Code, United States Code, title 28, Section 252, as follows:

"*Judgments for set-off or counterclaims.* Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any District Court, shall be entered upon the records thereof and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced."

The power of the Court of Claims to render a judgment on a set-off in favor of the United States against any person making claim in the Court of Claims is a strictly constitutional power.

True, in *McElrath* v. *United States*, 102 U. S. 426 (1881), the power of the Court of Claims to try such a case without a jury was placed upon the ground of consent on the part of the plaintiff by bringing his suit in the Court of Claims to allow the Government to assert a counterclaim against him.

But if the Court of Claims is a mere legislative tribunal not

exercising any part of the "judicial power of the United States" named in the Constitution, the party is condemned without his day in court when a judgment is rendered against him to be enforced by a mere ministerial docketing of the judgment in the office of the clerk of any District Court of the United States. The exercise of this power of rendering judgments on set-offs to be enforced by execution anywhere throughout the country should alone settle the status of the Court of Claims as a constitutional tribunal.

In each case, whether in a normal one of a judgment rendered for the plaintiff against the United States or in the exceptional one in favor of the United States on a counterclaim, the mode of enforcing the judgment is the one appropriate to carrying it into effect.

*Right of Suit Allowed Certain Aliens.*

Light is thrown on this question by the provision of the organic law of the Court of Claims, Judicial Code, Sec. 155, U. S. Code, Title 28, Sec. 261:

"*Aliens.* Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

There have been a number of suits brought in the Court of Claims by British subjects. The question was raised under the above provision whether the law of England affords a proper and sufficient remedy to citizens of the United States in cases of invasion of their rights by that Government.

In *United States* v. *O'Keefe*, 11 Wallace, 178 (1871), where a proceeding by petition of right in England was treated as the exact equivalent of a suit in the Court of Claims in this country, this court said (p. 184):

"Evidently Congress meant to confer on the British subject the right to sue in the Court of Claims under the act relating

to captured and abandoned property, if, in the ordinary course of the administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object, can not admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights. Indeed, it is not less practical and efficient than a suit in the Court of Claims. And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament, and in this country on Congress, whether or not they shall be paid."

Judge, later Chief Justice, Nott, reviewing the decisions as to the rights of American citizens in various countries, said *Brown* v. *United States* (1870), 6 C. Cls. 171, 191, 192:

"When the work of establishing the Court of Claims was before Congress, it appeared by the reports of their own committees that as long ago as in 1848, of 17,573 private claims which within ten years had been presented to Congress, 8,948 had never been in any way acted upon, and but 910 had passed both Houses. (Report by Hon. J. N. Rockwell, from Committee of Claims, House of Representatives, April 26, 1848, first session Thirtieth Cong., vol. 3, No. 498). That such a number of American citizens should have been left by their own government without a hearing, and to that extent at least without redress, was of itself a great and grievous wrong. But while the great mass of creditors were left unheard, claims of doubtful character passed through Congress, some in forms which attracted attention, and others of which the country never heard, in the dubious disguise of *ex parte* arbitrations and awards.

"Finally, the public credit had suffered, and the government, like all irresponsible purchasers, was compelled to pay more in the market for what it bought than many of its own citizens, and the most prudent merchants and skilful manufacturers of the country refused to deal with it as a customer which held itself above all legal means of redress. To remedy these great mischiefs, the statesmanship of the day devised the Court of Claims. Coming before the Senate at first in the proposition to establish a board of commissioners for the investigation of claims, the bill was changed so as to establish a court for the

avowed purpose of giving finality to its judgments. 'I want,' said a statesman of that day as distinguished as any (Stephen A. Douglas)—'*I want an adjudication which I should deem binding upon us.*' The act establishing the court was as remedial a statute as any that Congress ever passed—to repress a mischief and to advance a remedy.

"In the great arrogance of great ignorance, our popular orators and writers have impressed upon the public mind the belief that in this republic of ours private rights receive unequalled protection from the government; and some have actually pointed to the establishment of this court as a sublime spectacle to be seen nowhere else on earth. The action of a former Congress, however, in requiring (Act July 27, 1868, 15 Stat. 243) that aliens should not maintain certain suits here unless their own governments accord a corresponding right to citizens of the United States, has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law."

He then proceeds to refer successively to the laws of Germany and her several component parts, France, Spain and England. He goes on (p. 197):

"Admonished by the common law of England and by the jurisprudence of nearly the whole civilized world, we hold that this action of the claimants to recover of the government their own money unlawfully withheld by its officers is a suit founded in justice and in right. We believe that it comports not with the honor and dignity of a republic to refuse to its citizens legal redress where their money or goods are in its hands more than with the honor and dignity of a king. The legislative power has committed to this court the duty of giving such redress in all cases where the claim is founded upon contract express, or upon contract implied, or upon a law of Congress. The act is remedial—to remedy great mischiefs and to avoid many grievous wrongs. It deserves to be liberally construed, and so as to repress the mischief and advance the remedy."

An elaborate examination of the whole question of the petition of right as a remedy was made by the House of Lords

in the case of *DeKeyser's Royal Hotel Limited* v. *The King* (1920) Appeal Cases, 508. This case was made the subject of a learned book, "The Case of Requisition," by Leslie Scott and Alfred Hildesley, in which it was said (p. 78):

"The conclusion, then, is that 'it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative.' It is submitted, therefore, that the alleged prerogative is not established by the evidence, and that the subject has a constitutional right to the enjoyment of his land, while the Crown is under a corresponding obligation to pay compensation where in case of emergency that right is affected."

While England has no written constitution distributing the various powers of the Government, we have seen that this court has held that a petition of right in that country is as practical and efficient a remedy as a suit in the Court of Claims in this country, and that in neither instance is it necessary to obtain an award of execution.

*Use of Physical Force to Carry out a Judgment of the Court of Claims is in No Case Essential to its Finality.*

This court has felt the same difficulty in regard to suits against States. In *Virginia* v. *West Virginia*, 206 U. S. 290, 209 U. S. 514, 220 U. S. 1, 222 U. S. 17, 231 U. S. 89, 234 U. S. 117, 238 U. S. 202, 241 U. S. 531, 246 U. S. 565, this court felt and expressed great difficulty in enforcing its judgment against West Virginia, a defendant reluctant to comply with the judgment of this court.

A graphic account of this case and of the difficulty found by the court in enforcing its judgment is given in the work by Chief Justice Hughes, "The Supreme Court of the United States," at pages 125 to 129.

It is noticeable that Chief Justice White in his opinion in *Virginia* v. *West Virginia*, 246 U. S. 565 (1918) suggests as the primary mode of enforcing the decree of this court "the power of Congress to legislate for the enforcing of the obligation of

West Virginia" (246 U. S. 601). And at pages 603 to 606 he appeals to the sense of duty of West Virginia to perform her constitutional duty of compliance with the judgment of this court.

Both these modes of enforcing judgments of the Court of Claims against the United States exist under statutes in force. It is not necessary to their finality that there should be any other.

This, however, was never deemed a ground for refusing jurisdiction and the court has strictly adhered in suits against States, even since the adoption of the Eleventh Amendment, to the rule originally announced by Chief Justice Jay in *Chisholm* v. *Georgia* (1793), 2 Dallas, 419, that it was not to be presumed that the Government of a State would neglect to comply with its obligations.

*Remarks of Mr. Justice Miller in* Lee *v.* United States (*Arlington Estate Case*).

Some remarks of Justice Miller in the noted case involving the Arlington estate, *United States* v. *Lee*, 106 U. S. 196 (1883), demonstrate how futile it is to make the judicial character of a judgment dependent upon whether the court can enforce it by physical process. The suit was an action to eject certain officers of the United States Army in possession of Arlington. Mr. Justice Miller says, toward the close of his opinion (p. 223):

"The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands.

"While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all.

"Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the

land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.

"From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority."

Even more direct was the conclusion in the same case of the Circuit Court then held by District Judge Hughes of the Eastern District of Virginia, 15 Federal Cases No. 8191, *Lee* v. *Kaufman* (1879), where it is said (p. 203):

"There is but one other and very unimportant part of the case to be dealt with, and that is the intimation that in the event of the plaintiffs recovering in this action, the court would have no power to make good its judgment by final process. But the court will not imagine that its judgment would be resisted. That is a matter that must take care of itself. Mr. Justice Blair, in *Chisholm* v. *State of Georgia*, 2 Dall. 451, after alluding to this argument *ab inutile* and speaking of the jurisdiction of the court being questionable on the ground that Congress had not provided any form of execution or pointed out any mode of making a judgment against a state effectual, said: 'Let us go on as far as we can, and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judicial act, we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers, to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a state may have other motives than such as arise from the apprehension of coercion to carry into execution a judgment of the Supreme Court of the United States, though not conformable to its own ideas of justice?' To the same effect were the words of Mr. Justice Grier in the case of *Elliott* v. *Van Voorst*, Fed. Case # 4390, where, in meeting the objection that there was no precedent to be found for his assuming jurisdiction of a cause, judgment on which the process of the court might be inadequate to enforce, with that practical wisdom and downrightness of speech which characterized him he said: 'It is time there was one.'"

**The Fact that Other Duties not in Strictness Judicial are Placed upon the Court of Claims Does not Impair the Constitutional Status of that Court.**

One objection strongly urged against the constitutional status of the Court of Claims is that the Court of Claims is invested with an advisory jurisdiction which can not be conferred upon a court existing as a constitutional body.

As we have seen from 1863 to 1883 the court possessed no powers which were not of a strictly judicial character authorizing it to render binding judgments against the United States. Its advisory jurisdiction is all contained in the act of March 3, 1883, ch. 116, 22 Stat. 485, commonly known as the Bowman Act, the French Spoliation Act of January 20, 1885, ch. 25, 23 Stat. 283, and Sections 12 and 14 of the Tucker Act of March 3, 1887, ch. 359, 24 Stat. 505.

If the Court of Claims was from 1863 to 1883 a constitutional court, this status was not taken away by Congress subsequently investing it with these advisory functions. At the present time it may be mentioned that the number of cases under these extra-judicial references of an advisory character is practically negligible.

The performance by justices of the courts of extra-judicial public services and functions, the finality and effectiveness of which depend upon legislative or executive approval or delegation of authority, has never been in this country deemed in derogation of the dignity of their offices, or of the courts of which they were members—e. g., the negotiation by Chief Justice Jay of a treaty with Great Britain; the services of Mr. Justice Brewer in the Behring Sea arbitration; the services of Mr. Justice Day as a member and umpire of the Mixed Claims Commission, United States and Germany, and of Mr. Justice Roberts as successor to the late Hon. Roland W. Boyden as a member and umpire of the same Commission.

The most striking and historical instance of duties being conferred upon judges of this court as such entirely outside of their functions as Justices of the Supreme Court was contained in the Electoral Commission Act of January 29, 1877, Ch. 37, 19 Stat. 227, "An Act to provide for and regulate the

counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March 4, 1877."

By this act five Senators, five Representatives and five Justices of this court were constituted a Commission to decide the Hayes-Tilden contested election. The provision as to Justices of this court was as follows (Sec. 2, p. 228):

"* * * who with the five associate justices of the Supreme Court of the United States, to be ascertained as hereinafter provided, shall constitute a commission for the decision of all questions upon or in respect of such double returns named in this section. On the Tuesday next preceding the first Thursday in February, A. D. 1877, or as soon thereafter as may be, the associate justices of the Supreme Court of the United States now assigned to the first, third, eighth and ninth circuits shall select, in such manner as a majority of them shall deem fit, another of the associate justices of said court, which five persons shall be members of said commission;"

The fact that the decision of a commission which included in its membership a majority of the members of this court was not necessarily final is emphasized by Section 6 of the act, p. 229:

"That nothing in this act shall be held to impair or affect any right now existing under the Constitution and laws to question, by proceeding in the judicial courts of the United States, the right or title of the person who shall be declared elected, or who shall claim to be President or Vice-President of the United States, if any such right exists."

Whether the Justices of this court so designated might, at their option, have refused to serve or not has never been decided or even made the subject of a question.

Some light is thrown on this aspect of the case by the decision in *United States* v. *Ferreira*, 13 Howard, 40 (1852). By the statute there considered the District Judge of the United States for the Northern District of Florida was authorized to receive and adjudicate claims of Spaniards for injuries occurring at the time of the late operations of the American Army in Florida. The Judge of the District Court accepted the duty

thus placed upon him by the statute. His authority to do so was in no manner whatever questioned by this court, but it was held that a judge did not in such a case act as a judicial tribunal but as a Commissioner and that for this reason, and this reason only, no appeal lay from his decision to this court. The court said by Chief Justice Taney, p. 47:

"It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence."

In this opinion there was not the slightest impeachment of the constitutionality of the statute which conferred this duty upon the judge as a judge. On the contrary, it was affirmed. It was only held that his decision in a case of this kind was a proceeding as a Commissioner rather than in the character of a court. The opinion proceeds (pp. 48, 49):

"The powers conferred by these acts of Congress upon the judge as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the constitution to the courts of the United States.

"The proceeding we are now considering, did not take place before one of the territorial judges, but before a district judge of the United States. But that circumstance can make no difference. For the act of 1849, authorizes him to receive and

adjudicate the claims of the persons mentioned in the law, under the act of 1834, and provides that these claims may be settled by the Treasury, as other cases under the said act. It conferred on the district judge, therefore, the same power, and the same character, and imposed on him the same duty, that had been conferred and imposed on the territorial judges before Florida became a State."

* * * * * * * * * *

"But the acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court."

The decision in this case is applicable in its fullness to the power of the Court of Claims proceeding as an advisory tribunal in certain exceptional cases. In no way does it affect the validity of a judgment of the Court of Claims acting as a constitutional court deciding cases arising under the Constitution and laws of the United States, "controversies to which the United States shall be a party."

Since 1866, a matter coming before the court under its general jurisdiction (U. S. Code, Title 28, Sec. 250) should be denominated what it inherently is, that is, a suit or "controversy." With respect to such litigation there are proper parties, plaintiff and defendant. The subject-matter of the suit is, by the court, finally resolved and judically determined, the court functioning judicially and rendering final and binding judgments. On the other hand, in respect to claims pending before Congress or matters submitted by the Executive Departments, there is, in the proper use of the term, no suit, and no judicial determination is involved. In such matters the trained body of jurists—who, it is true, constitute at the same time the court—functioning as a specially created Legislative Commission or advisory body, make their findings of fact and conclusions of the law applicable thereto and submit their findings and opinions for the information and guidance of the legislative body or the Executive Departments concerned.

**Every Case in which the Subject was Either Decided or Touched Upon by this Court has Held the Court of Claims to be a Constitutional Court from 1863 Until a Very Recent Date.**

The opinion of Chief Justice Taney in the *Gordon* case, 117 U. S. 697, was not adopted by this court as the opinion of the court. That of Chief Justice Chase, first accurately reported in 7 C. Cls. 1, as well as in the text of the opinion of Chief Justice Waite in *United States* v. *Jones*, 119 U. S. 477, 478, was on the ground that the head of an Executive Department had authority "to revise all the decisions of that court requiring payment of money." That objectionable feature was later removed by the act of 1866 as explained in *United States* v. *Jones*, 119 U. S. 477, 478, and foot p. 479. With this section repealed the Supreme Court has ever since taken cognizance of appeals from the Court of Claims. The *Gordon* case itself was later considered and decided on its merits. 7 Wallace, 188 (1869).

In *United States* v. *Louisiana*, 123 U. S. 32 (1887) the right of a State to sue in the Court of Claims was placed directly upon the clause of the Constitution extending the judicial power to all cases arising under the Constitution and laws of the United States and "to controversies to which the United States shall be a party."

Mr. Justice Field, giving the opinion of the court, said (pp. 35-37):

"The Constitution declares that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish,' and 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or

subjects.' This clause was modified by the Eleventh Amendment, declaring that 'the judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

"As thus modified, the clause prescribes the limits of the judicial power of the courts of the United States. The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court. The same article of the Constitution which defines the extent of the judicial power of the courts of the United States, declares, that 'in all cases affecting ambassadors, other public ministers, and consuls, and *those in which a State shall be party*, the Supreme Court shall have original jurisdiction. In all other cases,' 'the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.' Although the original jurisdiction of the Supreme Court, where a State is a party, as thus appears, is not in terms made exclusive, there were some differences of opinion among the earlier judges of this court whether this exclusive character did not follow from a proper construction of the article. In a recent case, *Ames* v. *Kansas*, 111 U. S. 449, this question was very fully examined, and the conclusion reached that the original jurisdiction of the Supreme Court, in cases where a State is a party, is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States. In that case, it is true, the action was commenced by the State in one of her own courts, and, on motion of the defendant, was removed to the Circuit Court of the United States, and the question was as to the validity of this removal. The case having arisen under the laws of the United States, it was one of the class which could be thus removed, if the Circuit Court could take jurisdiction of an action in which the State was a party. It was held that the Circuit Court could take jurisdiction of an action of that character, and the removal was sustained. The judiciary act of 1789, it is true, declares that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between

a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction.' This clause, however, can not have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 3, 1875, ch. 13, 18 Stat. 470, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none."

In the very recent case of *Hurley* v. *Kincaid*, 285 U. S. 95 (1932), this court was asked to sanction an injunction against the Secretary of War and other officers of the Government from proceeding with the Flood Control Project on the Mississippi River until the damage occasioned plaintiff's lands by overflow should be paid for or secured. This court refused to grant the injunction on the ground that the provisions of the Tucker Act providing for suit in the Court of Claims, or if not exceeding $10,000 for suit in the District Court, afforded the plaintiff an adequate and complete remedy satisfying all the requirements of the Fifth Amendment to the Constitution providing against the taking of private property without just compensation. In so holding the court, by Mr. Justice Brandeis, said (pp. 103–105):

"We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. Compare *United States* v. *Lynah*, 188 U. S. 445, 469; *United States* v. *Cress*, 243 U. S. 316, 328; *Peabody* v. *United States*, 231 U. S. 530, 538; *Portsmouth*

*Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; 260 U. S. 327, 329. If that which has been done, or is contemplated, does constitute such a taking the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 658; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 600; *Tempel* v. *United States*, 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking. *Crozier* v. *Krupp*, 224 U. S. 290, 306. Compare *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Cragg* v. *Weaver*, 251 U. S. 57, 62; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668, 677; *Dohany* v. *Rogers*, 281 U. S. 362, 366.

"As the complainant has a plain, adequate and complete remedy at law, the judgment is reversed with direction to dismiss the bill without prejudice."

Here, the remedy in the Court of Claims is referred to as of such a potent and far-reaching character as to satisfy the constitutional requirement for compensation under the Fifth Amendment. The constitutional requirement for just compensation for the taking of private property for public use is satisfied by a proceeding in the Court of Claims. The Fifth Amendment could not thus be satisfied unless the Court of Claims is held to be exercising the constitutional power of a court having jurisdiction of a "controversy to which the United States shall be a party."

**Other Cases in which the Constitutional Character of the Court of Claims as a Court Invested with Jurisdiction of "Controversies to which the United States Shall be a Party" has been either Assumed or Directly Decided.**

We have already referred to and in part quoted a number of decisions of this court where the decision either decided or necessarily assumed the constitutional judicial power of the Court of Claims.

It remains to notice other decisions of this court which either assume or directly decide the status of the Court of Claims as a court constituted to exercise a part of the judicial power of the United States as defined by the Constitution.

There were two acts of practically contemporaneous enactment relating to the Court of Claims. One was the act of March 3, 1863, providing for the reorganization of the Court of Claims; the other was that of March 12, 1863, relative to abandoned and captured property in insurrectionary districts, allowing the owner to recover the net proceeds thereof by suit in the Court of Claims. This last act was somewhat indefinite as to the kind of proceeding or judgment to be taken by the Court of Claims and whether the court acted as a mere Commission or was empowered to render final judgment.

These questions were answered in *United States* v. *Anderson*, 9 Wallace, 56 (1870). The court there said (pp. 71, 72):

"The point taken that the court below was not authorized to render judgment for a specific sum, but only to determine whether the claimant was entitled to receive the proceeds of his property, leaving it for an officer of the Treasury to fix the amount, can not be sustained. To sustain this position would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. This court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect."

In *United States* v. *O'Grady*, 22 Wallace, 641, 647, 648 (1875), the question was whether after the Court of Claims had given a judgment for the proceeds of abandoned and captured

property under the act of March 12, 1863, the Secretary of the Treasury had any power to reduce the amount of that judgment. It was held that he had none and that the plaintiff was entitled to recover the whole amount without any deduction or tax on the ground that a judgment of the Court of Claims is conclusive and not subject to revision by the Secretary of the Treasury.

Mr. Justice Clifford, delivering the opinion of the court, said (pp. 646, 647):

"But the United States did not appeal from the judgment of the Court of Claims, nor does it appear that any application in their behalf was made to that court for a new trial, as expressly authorized by an act of Congress. On the contrary, it appears that the United States acquiesced in the judgment and claimed to deduct from it the amount now in controversy as due to the government for the internal revenue tax. Such a power is not vested in the Secretary of the Treasury, nor in any other executive officer of the government, even if it could be; and it is clear that the judgments of this court, rendered on appeal from the Court of Claims, if no such power is conferred by an act of Congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the beforementioned act of Congress."

The opinion concludes with this emphatic language (p. 648):

"Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial."

The same principle of finality of judgments of the Court of Claims was applied to the Court of Claims in *United States* v. *Moser*, 266 U. S. 236 (1924), applying the principle of *res judicata* to the determination of the status of a naval officer as made by the Court of Claims in a previous case.

These two decisions in respect to the finality of decisions of the Court of Claims are in striking contrast to the rule applied by this court to a prior adjudication of the Court of Customs Appeals in *United States* v. *Stone & Downer Company*, 274 U. S. 225 (1927).

In *United States* v. *Borcherling*, 185 U. S. 223 (1902), the right to recover money appropriated under a special act was in conflict between two claimants thereunder. The court said (p. 234):

"It is not open to doubt that the Court of Claims has jurisdiction to entertain the claim of the receiver to receive the fund, the title to which had thus become vested in him. The jurisdiction of that court extends throughout the United States. It issues writs to every part of the United States, and is specially authorized to enforce them. 10 Stat. 612, c. 122, sec. 3. By establishing this court, the United States created a tribunal to determine the right to receive moneys due by the Government."

*Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902), was an original suit in this court by the State of Minnesota against the Secretary of the Interior, involving the title to certain lands. By an act of Congress, passed with special reference to the controversy, the United States was authorized to appear in the suit through certain officers to defend the Government's title to the lands. The court in its opinion by Mr. Justice Brewer made the following remarks which are of the utmost pertinency to the question involved in this case (pp. 384, 386, 388):

"This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.

"Our conclusion, therefore, is that the original jurisdiction vested by the Constitution in this court over controvesies in which a State is a party is not affected by the question whether the State is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the State. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits."

Here, the question as to whether either the United States or a State is to be considered a party to the controversy is held to be a matter of indifference as to whether the United States or a State is party plaintiff or party defendant. The whole jurisdiction of the Court of Claims is stated to rest upon this proposition.

The question of the status of the Court of Claims formed a necessary element in the decision of *Miles* v. *Graham*, 268 U. S. 501 (1925). This was a suit by a judge of the Court of Claims against the Collector of Internal Revenue to recover back an internal revenue tax paid upon his salary as a judge of the Court of Claims. It was held to be constitutionally prohibited. The doctrine of *Evans* v. *Gore*, 253 U. S. 245 (1920), was fully applied, and even extended. In the case of Judge Evans the tax was not imposed until after he accepted his office. In the case of Judge Graham he took office with the act imposing a tax on his salary already on the statute-book. Many of the reasons given in the *Evans* case applied with greater force to a judge passing on the rights between the Government and its citizens than they did to the case of a judge engaged in adjudicating controversies between two citizens. The opinion of the court by Mr. Justice Van Devanter says (pp. 248, 249):

"With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous

discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?"

The remarks of Chief Justice Marshall (p. 250) have a special application to judges passing on controversies between the Government and citizens:

"Advert, Sir, to the duties of a Judge. He has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness?"

It is difficult to see in what respect the authority of *Miles* v. *Graham*, 268 U. S. 501 (1925), can be impeached when the court of which he was a member was distinctly stated in the opinion and when in both that case and the one involving the salary of Judge Evans there was a dissent (accompanied in the *Evans* case with an opinion) emphasizing the care with which both cases were considered by all the members of the court.

A letter of Chief Justice Taney to the Secretary of the Treasury in 1863, and ordered to be entered on the records of the court, 157 U. S. 701–703, protests against imposing a tax on the salary of any judicial officer of the United States. These taxes were at a later date refunded to all the justices of this court of that day, one of them by judgment of the Court of Claims rendered as late as 1891, *Wayne* v. *United States*, 26 C. Cls. 274, 290.

## The Union Pacific Cases Considered.

The opinion of the court by Mr. Justice Miller in *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569 (1879), is dismissed in the opinion in the *Bakelite Corporation* with the remark that it was not necessary to the decision. A reference to the history of the litigation by and against the Union Pacific Railroad Company shows how it came to be made.

By sections 2 and 4 of the Legislative, Executive and Judicial Appropriation Act of March 3, 1873, ch. 226, 17 Stat. 485, 508, 509, two suits were authorized—one by the Union Pacific Railroad Company against the United States, the other by the United States against the railroad.

The first of these provisions (17 Stat. 508) reads as follows:

"Sec. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation, over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed together with the five per cent of net earnings due and unapplied as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them and either party to such suit may appeal to the Supreme Court and both said courts shall give such cause or causes precedence of all other business."

Section 4 (p. 509) directs the Attorney General to institute a suit in equity in the name of the United States against the Union Pacific Railroad Company and against any of its stockholders, etc., who have received moneys or other property which ought in equity to belong to the corporation and for the restoration of such property or its value, either to the railroad company or to the United States, whichever shall in equity be held entitled thereto. The suit was to be brought in the Circuit Court of any District and all the parties might be made defendants in one suit. Writs of subpoena were to be issued

by the court against any parties defendant, the writs running to any district and to be served by the marshal of such district.

Under the former of these two sections, the Union Pacific Railroad Company instituted suit against the United States to recover moneys due to it from the Government. The Court of Claims gave judgment in favor of the company (10 C. Cls. 548) (1875). This judgment was appealed to this court and the judgment affirmed, *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72 (1876). The question was whether the company was entitled under its charter to retain one-half of its earnings and only reimburse the United States to the extent of the other half.

The opinion of this court by Mr. Justice Davis thus states in brief form the effect of Section 2 of the act, 91 U. S. 91:

"This means nothing more or less than the remission to the judicial tribunals of the question, whether this company, and others similarly situated, have the right to recover from the government one-half of what they earned by transportation; and this question is to be determined upon its merits.

"The merits of such a question are determined when the effect of the charter is ascertained and declared."

The suit by the United States against the Union Pacific Railroad Company, authorized by section 4 of the act, was instituted by the United States in the Circuit Court of the United States for the District of Connecticut. It was decided by that court adversely to the United States and the bill dismissed, 28 Federal Cases, Case #16598 (1873). This case was taken to the Supreme Court and the judgment affirmed, *United States* v. *Union Pacific Railroad Company*, 98 U. S. 569 (1879). One of the objections to the maintenance of the suit was that Congress had no power to authorize suit to be brought in a Circuit Court in a District in which the railroad corporation neither had an office nor transacted business. The case therefore involved the constitutional authority of Congress to distribute the judicial duties and powers of the United States among tribunals.

The close connection between the two cases is shown by the

opening paragraphs of the opinion by Mr. Justice Miller (p. 601):

"The Union Pacific Railroad Company brought the suit provided for in the second section of the act of March 3, 1873, 17 Stat. 508. The case was argued before us on appeal from the judgment of the Court of Claims. All the questions which concern the obligations of the company to pay money to the government, either by way of freight or government transportation, or for the five per cent on the net income of the road, were raised in that suit.

"The Attorney-General, in pursuance of the directions of the fourth section of the act, filed this bill in equity. Many of the defendants demurred to the bill generally, and at the head of this class is the railroad company.

"The Circuit Court sustained this demurrer and dismissed the bill, and the case is before us on appeal from that decree."

The opinion continues (pp. 602, 603, 604):

"The Constitution declares (art 3, sec. 2) that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; and to controversies to which the United States shall be a party.

"The same article declares in sec. 1, that this 'power shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain.'

"The discretion, therefore, of Congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the Supreme Court. On that court the same article of the Constitution confers a very limited original jurisdiction,— namely, 'in all cases affecting ambassadors, other public ministers, and consuls, and cases in which a State shall be a party,'— and an appellate jurisdiction in all the other cases to which this judicial power extends, with such exceptions and under such regulations as the Congress shall make.

"We say, therefore, that, with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution.

"Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found

in the Constitution. It has also regulated the appellate jurisdiction of the Supreme Court.

"The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion.

"It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government. This has been done in reference to the Court of Claims. It has now jurisdiction only of cases in which the United States is defendant. It is just as clearly within the power of Congress to give it exclusive jurisdiction of all actions in which the United States is plaintiff. Such an extension of its jurisdiction would include all that the statute under consideration has granted to the Circuit Court."

And (p. 609):

"The second section directs the Secretary of the Treasury to withhold payment for transportation for the United States until what is due for interest paid shall be satisfied, and the matter, if disputed, is to be settled by suit brought by the Company in the Court of Claims.

"This consideration makes it clear that any bill brought by the Attorney General under the fourth section of the Act of 1873 must be limited by the provisions of that act, both as to the grievances on which it counts and the relief which it seeks."

The close connection of that suit with the one previously brought by the railroad against the Government in the Court of Claims is shown by the following remarks on p. 614 as to the finality of the decision of the Court of Claims, affirmed as it had been by this court:

"One of its allegations is that there is due to the United States and unpaid, on account of interest on the bonds, the sum of $6,198,700, and that the balance of interest for which

the company is liable is rapidly accummulating. It was filed in May, 1873, and this court, at its October Term 1875, decided in *United States* v. *Union Pacific Railroad Co.*, (91 U. S. 72), that the company was not bound to pay this interest until the bonds mature, except so far as the act made in that regard two special provisions. One was that half the compensation for transportation performed for the United States should, as provided by the subsequent amended charter of 1864, be withheld by the Government for that purpose; the other was that after the completion of the road five per cent of its net earnings were to be applied annually to extinguish the debt to the United States.

"The second section of the Act of 1873, as we have seen, provides for the first of these cases (10 C. Cls. 548), and as to the other, the government has brought suits, which are now ripe for decision in this court."

And again (p. 620):

"The liberal manner in which the government has aided this company in money and lands is much urged upon us as a reason why the rights of the United States should be liberally construed. This matter is fully considered in the opinion of the court already cited, in *United States* v. *Union Pacific Railroad Co.* (*supra*), in which it is shown that it was a wise liberality for which the government has received all the advantages for which it bargained, and more than it expected."

These two cases, the suit of the Union Pacific Railroad Company against the Government in the Court of Claims and that of the Government against the railroad company in the Circuit Court for the District of Connecticut, were so interrelated that while the remarks in the latter case on the jurisdiction of the Court of Claims may not have been absolutely essential to the decision of the case from the Circuit Court, District of Connecticut, the two cases were so closely connected as to make the remarks of this court in the Connecticut case highly pertinent to the suit by the railroad company in the Court of Claims.

The two suits determined by this court in Volumes 91 and 98 United States Reports, respectively, involve parts of the same transaction. The jurisdiction of the Court of Claims was necessary to a determination of those phases of the transaction before that court, and those proceedings did, as a matter of

fact, conclude the judicial determination of the relations between the parties, the demurrer by the defendants in the equity proceedings in the Circuit Court being sustained on other than jurisdictional grounds. In view of the matters before the court, the well-reasoned conclusions of the court in the *Union Pacific Railroad Company case*, *supra*, fall, if at all, barely within the content of the term *obiter dictum*. Assuredly, in the litigation of the matters of which certain phases were before the Supreme Court on appeal from the Circuit Court, the Court of Claims had entertained, heard and judicially determined gravely important controversies to which the United States was a party, and so necessarily exercised, as concluded by the Supreme Court through Justice Miller, a part of the judicial power provided by Article III of the Constitution.

**Statutes Passed During the World War Providing for Suits for Compensation Against the United States, some to be Brought Exclusively in the District Courts, some in Both the District Courts and the Court of Claims, in the Manner Provided by Section 24, Par. 20 and Sec. 145 of the Judicial Code, and Some to be Brought Only in the Court of Claims.**

These statutes are very numerous. A complete analysis of them is given in the very comprehensive opinion of Mr. Justice Brandeis in *United States* v. *Pfitsch*, 256 U. S. 547 (1921). In the body of the opinion it is shown that in four classes of cases suit may be brought in the District Courts alone:

(1) Cases under Section 10 of the Lever Act of August 10, 1917, ch. 53, 40 Stat. 276, 279, providing for the requisitioning of foods, feeds, fuels and other war supplies with the necessary storage facilities.

(2) War Risk Insurance Act of May 20, 1918, ch. 77, 40 Stat. 555.

(3) Act of March 4, 1919, ch. 125, Sec. 3, 40 Stat. 1348, authorizing requisitioning of storage facilities for wheat.

(4) Act of July 11, 1919, ch. 145, Sec. 2, 40 Stat. 898, per-

mitting suits against the United States on marine insurance in the district court of the United States sitting in admiralty.

It is added (pp. 552, 553):

"A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation. In seventeen instances, it definitely provided by reference to the appropriate sections of the Judicial Code for concurrent jurisdiction in the Court of Claims and the District Courts sitting as a court of claims. In the four instances above set forth it conferred jurisdiction only on the District Courts. In four instances it conferred jurisdiction only on the Court of Claims."

The seventeen instances thus referred to are stated in Note 1 as follows:

"Statutes which provide for suits for compensation against the United States in both the District Courts and the Court of Claims in the manner provided by sec. 24, par. 20, and sec. 145 of the Judicial Code: Act of March 4, 1917, c. 180, 39 Stat. 1193, The Naval Emergency Fund Act;—Act of June 15, 1917, c. 29, 40 Stat. 183, Emergency Shipping Fund Act;—Act of August 10, 1917, c. 53, secs. 12, 16, 25, 40 Stat. 279, 282, 285;—Act of October 6, 1917, c. 79, 40 Stat. 353, 371–2, Land for ordnance proving ground and for naval construction;—Act of March 1, 1918, c. 19, 40 Stat. 438, 439, Shipping Board Housing;—Act of April 22, 1918, c. 62, 40 Stat. 535, Shipping Board trolleys or interurban railways;—Act of April 26, 1918, c. 64, 40 Stat. 537, 538, Land for ordnance proving ground;—Act of May 16, 1918, c. 74, sec. 2, 40 Stat. 551, Land for war housing;—Act of July 1, 1918, c. 114, sec. 5, par. d, 40 Stat. 720, Contracts for ships, war materials, factories, etc.;—Act of July 8, 1918, c. 139, sec. 1, 40 Stat. 826, Buildings for War Department in D. C.;—Joint Res. of July 16, 1918, c. 154, 40 Stat. 904, Telegraph systems;—Act of July 18, 1918, c. 157, sec. 14, 40 Stat. 916, Dry docks, wharves, warehouses, terminals;—Act of October 5, 1918, c. 181, sec. 3, 40 Stat. 1010, Minerals, ores, mines, smelters, etc.;—Act of November 21, 1918, c. 212, sec. 1, 40 Stat. 1048, Buildings for Department of Agriculture in D. C."

The four instances conferring jurisdiction only on the Court of Claims are thus stated in Note 2:

"Statutes which provide for suits for compensation against the United States only in the Court of Claims: Act of October 6, 1917, c. 106, sec. 10, 40 Stat. 422, Patents;—Act of July 1, 1918, c. 114, 40 Stat. 705, Patents used by United States;—Act of March 21, 1918, c. 25, sec. 3, 40 Stat. 454, Railroads;—Act of March 2, 1919, c. 94 sec. 2, 40 Stat. 1273, War contracts, etc."

Here the expression is used as it is so often in opinions of this court in regard to District Courts "sitting as a court of claims." There is no suggestion here or elsewhere that there is any difference in effect between the jurisdiction of the Court of Claims and the jurisdiction of a District Court exercising such concurrent or exclusive jurisdiction.

## CONCLUSION.

The Court of Claims is thus the recipient of a very large share of the judicial power of the United States under Article III, Section II of the Constitution.

1. All cases coming before it arise under the Constitution and laws of the United States. They also come within the grant of the Constitution "controversies to which the United States shall be a party." It has been repeatedly stated by high authorities from Justice Story's Commentaries in 1833 that this clause is not limited to controversies to which the United States shall be a party plaintiff but equally includes cases in which the United States are defendant.

2. This view has been repeatedly sanctioned by this court not only in the case of *Union Pacific Railroad Company*, 98 U. S. 569, the applicability of which has been questioned on the ground that the remarks made were not essential to a decision of the case, but in such cases as *United States* v. *Louisiana*, 123 U. S. 32, and in other cases which we have cited.

3. The fact that the Court of Claims can not call physical force to its aid in execution of its judgments rests upon a ground now disavowed in a recent case, *Fidelity National*

*Bank* v. *Swope*, 274 U. S. 123 (1927). It would also be an irregular, if not unconstitutional, mode of enforcing a judgment against the United States to undertake to collect it by physical force.

4. The District Courts, constitutional courts, exercise concurrent jurisdiction with the Court of Claims in a large class of cases against the United States, generally of inferior magnitude and importance. This can not be explained except on the theory that the constitutional status of the Court of Claims is at least equal to that of a District Court.

5. The case of *Miles* v. *Graham*, 268 U. S. 501 (1925), is a direct authority in point. The rule against reduction of salary by indirection through imposing an income tax on the salary of a judge in *Evans* v. *Gore*, 253 U. S. 245 (1920) was applied and even extended in its application to the judges of the Court of Claims by holding that the salary of a judge could not be reduced by income tax legislation in effect at the time of his acceptance of his office.

6. The policy of the Constitution applies with equal, if not greater effect, to reduction of salary of judges deciding between the Government and citizens than it does to those judges of courts acting largely upon cases between two citizens equal before the law.

It is suggested that the questions raised by the certificate be answered accordingly.

Respectfully submitted,

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## APPENDIX.

24 Stat. 505, Chap. 359—An act to provide for the bringing of suits against the Government of the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

"SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

"SEC. 3. That whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor,

or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

"SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

"SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be

recovered and praying the court for a judgment or decree upon the facts and law.

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

"SEC. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

"SEC. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

"Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

"SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of

error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

"SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same; *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

"SEC. 11. That the Attorney-General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered giving the date of each, and a statement of the costs taxed in each case.

"SEC. 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

"SEC. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further

opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.

"SEC. 14. That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, entitled an 'Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

"SEC. 15. If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

"SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

"Approved, March 3, 1887."